

***IN THE UNITED STATES PATENT AND TRADEMARK OFFICE***

Applicant: Andrei Ghetie, et al.  
Title: SCALABLE AND DYNAMIC QUALITY OF  
SERVICE CONTROL  
Appl. No.: 10/706,796  
Filing Date: 11/12/2003  
Examiner: Barbara N. Burgess  
Art Unit: 2457  
Confirmation Number: 7192

**REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT**  
**UNDER 37 C.F.R. §1.705**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

Applicants are in receipt of the Notice of Allowance for the above-captioned application. Applicants disagree with the Determination of Patent Term Adjustment (PTA) under 35 U.S.C. § 154(b) and present the following facts per the procedure set forth in 37 C.F.R. § 1.705(b) to support their contention that the patent term adjustment should be 1,524 days instead of 1,176 days as calculated by the United States Patent and Trademark Office (PTO).

The Patent Office determined that the patent was entitled to 1,176 days of PTA. Applicants believe that this PTA determination was made in accordance with the “Explanation of 37 CFR 1.703(f) and of the United States Patent and Trademark Office Interpretation of 35 U.S.C. §154(b)(2)(A)” published at 69 Fed. Reg. 34238 (Jun. 21, 2004). Under that interpretation of the PTA statute, any PTO delay under 35 U.S.C. § 154(b)(1)(A) is deemed to overlap with any 3-year maximum pendency delay under 35 U.S.C. § 154(b)(1)(B), and so, as a practical effect, PTA may be awarded under §154(b)(1)(A) or §154(b)(1)(B), but not both.

On September 30, 2008, the United States District Court for the District of Columbia issued a decision finding that the U.S. Patent and Trademark Office’s interpretation of the PTA

statute is incorrect. *Wyeth v. Dudas*, Civ. Action No. 07-1492 (JR) (Sep. 30, 2008). The court determined that, under the correct interpretation of the PTA statute, periods of “overlap” are limited to “periods of time . . . [that] occur on the same day.” *Wyeth*, slip op. at 8. Thus, a PTO delay under §154(b)(1)(A) overlaps with a delay under §154(b)(1)(B) only if the delays “occur on the same day.” *Id.*

Applicants have recalculated PTA for the captioned patent under the court’s interpretation of the PTA statute, and have determined that the patent is entitled to 1,524 days PTA, as shown on the attached sheet, which shows the relevant delays under 37 CFR §§1.702(a) and (b), and under 37 CFR §§1.703(a) and (b).

The attached sheet details the circumstances during the prosecution of the application resulting in the patent that constitute a failure to engage in reasonable efforts to conclude processing or examination of such application as set forth in § 1.704.

(a) Total of non-overlapping PTO delay under §154(b)(1)(A) & (B):	1,610 days
(b) Total Applicant delay:	86 days
Final PTA Determination:	1,524 days

Applicants therefore respectfully request that the patent be accorded 1,524 days PTA.

The patent is not subject to a terminal disclaimer.

Payment of the requisite fee is submitted herewith. Should no proper payment be enclosed herewith, as by the credit card payment instructions in EFS-Web being incorrect or absent, resulting in a rejected or incorrect credit card transaction, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 19-0741.

However, because this PTA error is due to a Patent Office error in interpreting and applying the PTA statute, a refund of the fee is respectfully requested.

Applicants request further that a decision on this request be deferred or delayed until a final decision has been rendered in *Wyeth v. Dudas*, which is now on appeal at the U.S. Court of Appeals for the Federal Circuit, under Federal Circuit Docket No. 2009-1120.

Respectfully submitted,

By  \_\_\_\_\_

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Date October 26, 2009

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## Patent Term Adjustment Calculation System

Add a new event to this case

Docket Number: 088245-7215

Application Number: 10/706796

Patent Number: N/A

	Event Description	Event Date	Days from Filing	PTO Days	Applicant Days
Edit Delete	Application Filing Date	11/12/2003	0		
Edit Delete	Notice to File Missing Parts	02/23/2004	103		
Edit Delete	Response to Notice to File Missing Parts	03/12/2004	121		
	14 month From Application date	01/12/2005	427		
	3 Year Period Starts	11/12/2006	1,096		
Edit Delete	Non-Final Office Action	06/27/2008	1,689	(1262)	
	Non-Final Office Action + 3 months	09/27/2008	1,781		
Edit Delete	Non-Final Office Action Rsp. Rcv'd at PTO	12/22/2008	1,867		86
CLOSE WINDOW	ALL CASES SELECT CASE				
Edit Delete	Final Office Action	03/13/2009	1,948		
Edit Delete	Final Office Action Response Received at PTO	05/07/2009	2,003		
Edit Delete	Request For Continued Examination (including amendment)	06/10/2009	2,037	(941) 1610	
	3 Year Period Stopped	06/10/2009	2,037		
Edit Delete	IDS NOT falling under 1.704(c)(6), (8) or (10) filed at PTO	06/25/2009	2,052		
Edit Delete	Notice of Allowance	08/21/2009	2,109		
	Projected Patent Grant Date	03/02/2010	2,302		
			Totals:	1,610	86
			PTA:	1,524	

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